LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 17 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 691

ERIE-LACKAWANNA RAILROAD COMPANY,

Appellant,

— against —

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

EDWARD W. BOURNE
Attorney for Appellant,
Erie-Lackawanna Railroad Company
120 Broadway
New York, N. Y. 10005
Tel. 212 RE 2-4290

J. KENNETH CAMPBELL
JOHN T. RAFFERTY
Of Counsel

October 17, 1966

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	4
STATUTES INVOLVED	6
STATEMENT	7
POINT I—Appeal merits a full hearing	19
POINT II—Three important reasons given by Commission in its September 16 Report for a prompt consummation of the merger are clearly untenable; Commission's findings relating thereto arbitrary and capricious; Commission's errors ignored by majority of Court below	27
POINT III—Fourth reason for prompt consummation given by Commission on September 16, involving protective conditions, eliminated by the Commission itself. Holdings of majority opinion relating to traffic conditions clearly erroneous	38
POINT IV—Majority opinion permitting early consummation of the merger based not upon Commission's reasons but principally on majority's own beliefs, suppositions and conjectures	46
POINT V—Appellant will suffer irreparable injury from early consummation of merger	51
POINT VI—Commission's findings as to expected savings from merger and prospects of improvement in service not adequate basis for denial of motion for interlocutory injunction	54

PAGE

POINT VII—Order of three-Judge Court did not accord appellant effective judicial review of Commission's Orders.

No solid prospect of effective judicial review of further orders 56

POINT VIII—The Commission's Orders were made in violation of statutory and constitutional requirements for notice and hearing 63

SCOPE OF APPEAL AND RELIEF REQUESTED 65

CONCLUSION 66

TABLE OF CASES AND STATUTES

Cases

PAGE

Burlington Truck Lines, Inc. v. *United States,* 371 U. S. 156 (1962) 22

Canadian Pacific Ry. Co. v. *United States,* 158 F. Supp. 248 (D. Minn. 1958) 58

Chicago, Burlington & Quincy R.R. Co. v. *United States,* 242 F. Supp. 414 (N. D. Ill. 1965), aff'd, 382 U. S. 422 (1966) 63

City of Nashville, Tennessee v. *United States,* 155 F. Supp. 98 (M. D. Tenn. 1957) 58

Florida East Coast Railway Company v. *United States,* 228 F. Supp. 340 (M. D. Fla. 1964) 58

Hill v. *Federal Power Commission,* 335 F. 2d 355 (5th Cir. 1964) 63

Illinois Central Railroad Company, et al. v. *United States* (N. D. Ill., E. D. 1965—unreported) 58

Minneapolis & St. Louis Ry. Co. v. *United States,* 165 F. Supp. 893 (D. Minn. 1958) 58

Morgan v. *United States,* 304 U. S. 1 (1938) 63, 64

Stott v. *United States,* 154 F. Supp. 389 (S. D. N. Y. 1957) .....59 (fn.)

United States v. *Drum,* 368 U. S. 370 (1962) 3

United States v. *Georgia Public Service Commission,* 371 U. S. 285 (1963) 3

Statutes

Administrative Procedure Act:

Section 5 (5 U.S.C. § 1004) ....4, 5, 6, 63, App. C, p. i

Section 7 (5 U.S.C. § 1006) ...4, 5, 6, 63, App. C, p. i-ii

Section 8 (5 U.S.C. § 1007) ..4, 5, 6, 28, App. C, p. ii-iii

Section 10 (5 U.S.C. § 1009) .....6, App. C, p. iii-v

PAGE

Bankruptcy Act:
Section 77 (11 U.S.C. § 205) ..... 7 (fn.), 32

Interstate Commerce Act (49 U.S.C.):
Section 5(1) ..... 6, App. B, p. i
Section 5(2) ..... 4, 5, 6, 20, 22, 58, 59, 63, App. B, p. ii-iv
Section 5(9) ..... 6, App. B, p. iv

Judicial Code:
28 U.S.C. § 1253 ..... 3, 6, App. A, p. i
28 U.S.C. § 1336 ..... 3, 6, App. A, p. i
28 U.S.C. § 1398 ..... 6, App. A, p. i
28 U.S.C. § 2284 ..... 2, 3, 6, 17, App. A, p. ii
28 U.S.C. § 2321 ..... 3, 6, App. A, p. iii
28 U.S.C. § 2322 ..... 3, 6, App. A, p. iv
28 U.S.C. § 2323 ..... 3, 6, App. A, p. iv
28 U.S.C. § 2324 ..... 3, 6, App. A, p. v
28 U.S.C. § 2325 ..... 2, 3, 6, App. A, p. v

* * * * * * * * *

U. S. Constitution, Fifth Amendment 5, 20, 63

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

ERIE-LACKAWANNA RAILROAD COMPANY,

Appellant,

— against —

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant, Erie-Lackawanna Railroad Company, appeals from an Order of the United States District Court for the Southern District of New York, entered on October 4, 1966, denying appellant's motion for an interlocutory injunction to enjoin the operation of certain Orders of the Interstate Commerce Commission which approved and authorized consummation of the merger of The New York Central Railroad Company into The Pennsylvania Railroad Company. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

Opinions Below

The Order appealed from is that of a three-Judge statutory Court (28 U.S.C. §§ 2284, 2325), one Judge dissenting. A majority opinion was filed by Circuit Judge Henry J. Friendly (District Judge Richard H. Levet concurring) and a dissenting opinion was filed by District Judge Edward Weinfeld. The opinions are not yet reported.

Copies of said opinions have been printed and annexed as Appendix A to the Jurisdictional Statement of appellants, The Baltimore and Ohio Railroad Company, et al., heretofore filed with this Court. References to pages of these opinions herein are to the printed pages of Appendix A of said Jurisdictional Statement.

The Report of the Interstate Commerce Commission, dated April 6, 1966, is reported at 327 I.C.C. 475 and a copy of the Order of April 6 is attached to the printed copy of the Report (327 I.C.C. 475-565) which is part of the record. The Report of the Commission on Reconsideration dated September 16 is reported at 328 I.C.C. 304-330, and is also annexed as Appendix B to the Jurisdictional Statement of appellants, The Baltimore and Ohio Railroad Company, et al. At the end of said Appendix B, at pages B-46 and B-47, there is a copy of the Order of September 16 which accompanied the Report of that date.

The copy of the Report on Reconsideration which was before the three-Judge Court was in mimeographed form and the page references to said Report in the opinions below are references to the mimeographed pages. **In referring herein to pages of said Report on Reconsideration, we will provide references to pages of both the mimeographed form and the printed form which appears as Appendix B to said Jurisdictional Statement.**

A copy of the Commission's further Order dated September 29, 1966 (which fixes October 31, 1966 as the date

for commencement of further hearings directed in said Report on Reconsideration) is printed and annexed as Appendix C to said Jurisdictional Statement of appellants, The Baltimore and Ohio Railroad Company, et al.

Jurisdiction

This action was commenced on September 8, 1966 by plaintiff (appellant herein) under 28 U.S.C. §§ 1336, 2284 and 2321-2325 to enjoin, annul or set aside an Order of the Interstate Commerce Commission dated April 6, 1966, as modified by certain Orders extending the time to file petitions and postponing the effective date of the Order of April 6. After commencement of the action and while plaintiff's motion for an interlocutory injunction was pending, said Commission issued its Report and Order on Reconsideration dated September 16, 1966 (released September 19, 1966), modifying its Report and Order of April 6, 1966. On the oral argument of plaintiff's motion (and the motions of intervening plaintiffs and of other plaintiffs in companion actions, now consolidated), the Court directed that all pleadings and pending motions would be deemed to be amended so as to relate to the Commission's Report and Order on Reconsideration which had been issued only two days before argument (Tr. 11-12).

The Order of the District Court denying plaintiff's motions for an interlocutory injunction was entered on October 4, 1966. Notice of appeal from that Order to this Court was filed by appellant in the District Court on October 13, 1966.

This Court has jurisdiction to review said Order on direct appeal under 28 U.S.C. § 1253.

Jurisdiction is sustained by the decisions of this Court in *United States* v. *Drum*, 368 U.S. 370, 373 (1962) and *United States* v. *Georgia Public Service Commission*, 371 U.S. 285, 287 (1963).

Questions Presented

The following questions are presented by this appeal:

1. Whether the District Court erred in refusing to grant plaintiff's motion for an interlocutory injunction on plaintiff's showing that it was probable that the Orders of the Interstate Commerce Commission authorizing consummation of the merger of The New York Central Railroad Company into The Pennsylvania Railroad Company had been issued in violation of the laws and Constitution of the United States and a further showing by plaintiff that, in the absence of such an interlocutory injunction, (i) the District Court would be deprived of its power to grant effective relief upon the entry of its final decree, (ii) plaintiff would be deprived of effective judicial review of said Orders and (iii) plaintiff would suffer irreparable damage.

2. Whether the District Court erred in holding that it was lawful under Section 5(2) of the Interstate Commerce Act (49 U.S.C. § 5(2)) for said Commission to find that the public interest required prompt consummation of said merger, while deferring for post-merger determination the framing of just and reasonable terms and conditions which were necessary to make the transaction consistent with the public interest.

3. Whether the District Court erred in failing to hold that said Commission violated Section 5(2) of the Interstate Commerce Act (49 U.S.C. § 5(2)) and Sections 5, 7 and 8 of the Administrative Procedure Act (5 U.S.C. §§ 1004, 1006, 1007) when, after finding that said merger would be consistent with the public interest only if certain specified conditions were imposed, said Commission subsequently rescinded certain of such conditions, ordered post-merger hearings to consider modification of all such conditions and purported to find that consummation of the merger would nevertheless be consistent with the public interest.

4. Whether the District Court erred in failing to hold that said Commission violated Section 5(2) of the Interstate Commerce Act (49 U.S.C. § 5(2)) and Sections 5 and 7 of the Administrative Procedure Act (5 U.S.C. §§ 1004, 1006) and the Fifth Amendment to the Constitution of the United States by prescribing novel, complex and important conditions to the consummation of said merger without affording any party affected thereby notice that it was considering the imposition of such conditions or affording any such party an opportunity for the presentation of evidence and argument at a hearing directed to the framing of such conditions.

5. Whether the District Court erred in holding that the requirements of the statutes and constitutional provisions cited in Question 4 above were satisfied by a direction of said Commission for the conduct of a hearing as to such conditions after consummation of said merger.

6. Whether the District Court erred in declining to hold that said Commission's conclusion that the public interest required prompt consummation of said merger was in conflict with the facts, arbitrary and capricious; was based on findings which were not supported by or in accordance with the reliable, probative and substantial evidence as required by Section 7(c) of the Administrative Procedure Act (5 U.S.C. § 1006(c)); and was not supported by adequate findings and conclusions, as well as the reasons or basis therefor, as required by Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)).

7. Whether the District Court erred in denying plaintiff's motion for an interlocutory injunction on the basis of the Court's own judgment (largely predicated on beliefs, suppositions and conjectures that were not supported by the record before it) that it was in the public interest to have a prompt consummation of the merger, notwithstanding that the reasons on which the

Commission had reached the conclusion that a prompt consummation of the merger was in the public interest, as set forth in the Commission's Report on Reconsideration, clearly failed to support that conclusion.

Statutes Involved

The following statutes are involved in this case and are printed in Appendices to this Statement as indicated below:

Appendix A: Includes 28 U.S.C. §§ 1253, 1336, 1398, 2284, 2321-2325.

Appendix B: Includes § 5(1), § 5(2)(a), (b), (c) and (d) and § 5(9) of the Interstate Commerce Act (49 U.S.C. § 5).

Appendix C: Includes §§ 5(a), 5(b), 7(c), 8(b) and 10 of the Administrative Procedure Act (5 U.S.C. §§ 1004(a), 1004(b), 1006(c), 1007(b) and 1009).

STATEMENT

This is an appeal from an Order of a three-Judge United States District Court for the Southern District of New York denying (one Judge dissenting) the plaintiff's motion for an interlocutory injunction enjoining the consummation of the merger of The New York Central Railroad Company and The Pennsylvania Railroad Company under an Order of the Interstate Commerce Commission[1] dated April 6, 1966[2], as modified by an Order dated September 16. Each Order was accompanied by a Report of the Commission which was issued simultaneously therewith.

---

[1] Abbreviated names or initials will be sometimes used herein as follows:

Commission	—The Interstate Commerce Commission
Penn	—The Pennsylvania Railroad Company
Central	—The New York Central Railroad Company
E-L	—Erie-Lackawanna Railroad Company, the appellant
D&H	—The Delaware and Hudson Railroad Corporation
B&M	—Boston and Maine Corporation
Court	—The three-Judge Court
New Haven	—The New York, New Haven and Hartford Railroad Company and/or the Trustees of the property of that Company appointed in reorganization proceedings under § 77 of the Bankruptcy Act pending in the United States District Court for the District of Connecticut
Merger	—The proposed merger of Penn and Central
Merged Company	—The corporation which would survive the merger, i. e., The Pennsylvania Railroad Company with its name changed to Pennsylvania New York Central Transportation Company

[2] In giving dates in the year 1966, the year will usually be left out.

The merger; the several railroads.

Measured in terms of total railway operating revenues, Penn is the largest railroad in the United States and Central is the third largest. The merged company would serve every important Atlantic port from Boston to Baltimore; Chicago, St. Louis and other gateways to the West; and every large city in the Eastern District—the northeast quadrant of the United States. The merger would be by far the largest railroad merger in the history of the United States.

The Commission's Reports customarily refer to the appellant, Erie-Lackawanna Railroad Company, to The Delaware and Hudson Railroad Corporation and to Boston and Maine Corporation collectively and use the initials E-L, D&H and B&M. There are two reasons why these collective references to E-L, D&H and B&M are logical. First, E-L connects with D&H at Binghamton, N. Y., and D&H connects with B&M at Mechanicville, N. Y. (near Albany), and important traffic moves to and from New England over the lines of E-L, D&H and B&M. Second, the Commission found that the Penn-Central merger would have much the same adverse, not to say catastrophic, effects on each of the three railroads unless they were "protected during the period necessary to determine their future". Accordingly, the Commission fashioned certain conditions, generally referred to as the "protective conditions", which apply only to E-L, D&H and B&M and which will be discussed later.

Erie-Lackawanna Railroad Company (E-L), the appellant, had railway operating revenues of $229,994,374 in 1965. It has two main lines extending westward from Hoboken, N. J. through Binghamton, N. Y. to Hornell in western New York. From Hornell one main line goes to Buffalo and another to Chicago. E-L reaches many important cities between Hoboken and Chicago, as far south

as Dayton, Ohio and as far north as Oswego, N. Y. It has the largest export-import traffic to and from New York Harbor of any railroad, and reaches Chicago by its own lines and St. Louis through connections. The Chicago and St. Louis gateways handle traffic to and from the west and southwest.

D&H and B&M are smaller than E-L; their combined railway operating revenues in 1965 were less than 50% of E-L's.

E-L, D&H and B&M all compete with Penn and/or Central for the handling of traffic and all three roads also interchange traffic with Penn and/or Central.

While E-L can hardly be characterized as small, the combined railway operating revenues of E-L, D&H and B&M in 1965 were only 21.6% of the combined railway operating revenues of Penn and Central in that year.

The New Haven had railway operating revenues of $121,434,147 in 1965 and operates approximately 1,594 miles of road in Massachusetts, Rhode Island, Connecticut and New York. One of the New Haven's main lines is from Maybrook, N. Y., southwest of Poughkeepsie (where it connects with E-L), to Devon, which is between Bridgeport and New Haven on the New York-Boston main line.

Other relevant railroad unifications and inclusion proceedings.

On December 17, 1962 the Commission authorized The Chesapeake and Ohio Railway Company (C&O) to acquire control of The Baltimore and Ohio Railroad Company (B&O). 317 I.C.C. 261.

On June 24, 1964, in Finance Docket No. 21510, the Commission approved the merger of New York, Chicago

and St. Louis Railroad Company (the Nickel Plate) into Norfolk and Western Railway Company (N&W), the lease of Wabash Railroad Company, and the purchase of the Sandusky Line. 324 I.C.C. 1. Under paragraph 1 of Appendix O to the Commission's Order (324 I.C.C. at 148), E-L, D&H and B&M were given the right to file petitions for inclusion in the Norfolk and Western System, and the Commission reserved the power to require the inclusion of any of the three, if it were found to be consistent with the public interest, upon terms determined by the Commission to be equitable. By paragraph 3 of Appendix O the consummation of the transaction which the Commission approved constituted "acquiescence in and irrevocable assent to the conditions stated in this appendix" by N&W.

E-L, D&H and B&M all filed petitions in Finance Docket No. 21510 for inclusion in the N&W System, hearings thereon have been completed, and briefs filed. N&W has been vigorously resisting the inclusion proceedings in Finance Docket No. 21510 and pressing a program of its own, next to be mentioned.

On October 11, 1965, N&W and C&O filed an application in Finance Docket No. 23832 for authority to merge, and subsequently requested that hearings be commenced. On October 5, 1966,[3] the Commission released an Order denying the request and directing that "further processing of the instant applications" be held "in abeyance pending further order of the Commission." The Commission's findings made it clear that it intended to have the petitions of E-L, D&H and B&M in Finance Docket No. 21510, to be included in the *present* Norfolk and Western System, decided first.

[3] This Order, dated October 4, was not released until October 5, after the decision of the three-Judge Court herein on October 4.

The appellants who are plaintiffs in the second and third of the three actions which were brought in the District Court and subsequently consolidated, and who are listed in the Jurisdictional Statement in this Court on the appeal entitled *"Baltimore and Ohio Railroad Company, et al., Appellants,* v. *United States of America, et al., Appellees"* are all affiliated or hoping to be affiliated. C&O controls B&O; B&O has a large interest in Reading Company (Reading), which in turn has a large interest in Central Railroad Company of New Jersey (CNJ); B&O also has a large interest in Western Maryland Railway Company (WM). N&W is attempting to merge with C&O, as already stated.

The diverse interests of the "protected carriers" and the "unprotected carriers" who are appellants.

E-L and D&H have substantially identical interests with respect to the protective conditions, *viz.*, to be assured of adequate conditions. B&M's interests would seem to be the same, but it has not been so active or consistent in endeavoring to obtain adequate protective conditions.

The appellants in *Baltimore and Ohio Railroad Company, et al.* v. *United States of America, et al., Appellees,* are substantially in accord with E-L and D&H as to the illegality of the procedure which the Commission followed, but their position conflicts sharply with E-L and D&H as to what protective conditions should have been, or should be, adopted. This will be quite clear from the respective Jurisdictional Statements.

Certain Commission findings as to E-L, D&H and B&M in the April 6 Report.

With respect to E-L, D&H and B&M and the adverse effects upon them of a Penn-Central merger, the Com-

mission made, in the April 6 Report, certain crucially important findings, (327 I. C. C. at 529, 532) all of which are quoted in Judge Weinfeld's opinion (p. A-43):

> "The service [E-L, D&H and B&M] render their shippers is essential and the public interest dictates that it be preserved. Unless somehow protected, through inclusion herein or by some other equitable means, [E-L, D&H and B&M] would be adversely affected by the proposed merger to a serious degree and would be severely handicapped in providing required transportation to the highly industrialized areas they serve." (page 529)
>
> * * * *
>
> "... [W]e conclude that immediate consummation of the proposed merger would be consistent with the public interest, if conditions are imposed to obviate impairment or serious weakening of E-L, D&H or B&M, or the rendering of them individually or collectively substantially less capable of providing service to their shippers and connections." (page 532)
>
> * * * *
>
> "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, *unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger.*"[4] (page 532)

Accordingly, the Commission imposed the so-called protective conditions, the announced purpose of which was to protect E-L, D&H and B&M "during the period necessary to determine their future".

---

[4] All italics in this Jurisdictional Statement are supplied.

The conditions—terminology.

It is suitable to make it entirely clear what the terms used herein mean:

Traffic Conditions—referred to by the defendants, Penn and Central (hereinafter sometimes called "the two Railroad Companies" or "the Railroad Companies") as the "status quo conditions". These conditions are intended to restrict what the merged company could do after the merger, the purpose of the restrictions being to eliminate or minimize the adverse effects of the merger on E-L, D&H and B&M.

Indemnification Condition—the provision for the payment of indemnification by the merged company to E-L, D&H or B&M whenever, notwithstanding the traffic conditions, any of the three smaller carriers should appear to have been adversely affected by the merger.

Protective Conditions—the traffic conditions and the indemnification condition, but not the capital loss indemnity condition.

Capital Loss Indemnity Condition—this proposed condition is described in the Commission's Report of September 16 (p. 37; p. B-41) as having been requested by E-L, D&H and B&M in order to "supplement the protection of appendix G [to the Commission's Report of April 6] to require the merged company to compensate them for any diminution in the capital value of their properties resulting from anticipated diversion of freight traffic by the merged company, but only in the event that they will be included in the N&W system on terms which reflect such a diminution in value." The Commission did not deal with any capital loss indemnity in its Report of April 6.

In this Jurisdictional Statement we will limit ourselves to the two protective conditions and will not undertake to deal with the capital loss indemnity condition because of our uncertainties as to the effects of the statements in the

Commission's Report of September 16 with respect to the capital loss indemnity and our wish not to add to the length of what will be a rather long Statement.

There was no testimony, hearing or argument as to the protective conditions prior to the Commission's April 6 Report, and none thereafter except by the medium of the petitions for reconsideration, rehearing, etc.

The protective conditions were not the subject of any testimony, exhibits or argument, written or oral, before the Commission, and prior to the service on April 27 of the Report dated April 6, no notice was given by the Commission, any division, bureau, board or examiner that the Commission was considering the conditions which were adopted in the Report. The same thing is true as to any other protective conditions resembling those which were adopted in the Report.

As to such conditions, E-L has never had an opportunity to present testimony or exhibits or make any oral argument. The only remedy allowed E-L was to file a petition for reconsideration and rehearing, as hereinafter stated.

The importance, novelty and complexity of the protective conditions.

The Commission's explicit findings eliminate any need for a showing of the importance of the protective conditions.

It is undisputed that the conditions are novel.

The traffic conditions inevitably presented great intrinsic difficulties. This point is developed briefly later (p. 45).

The indemnification condition perhaps did not necessarily present such a difficult problem as the traffic conditions, but E-L considers that two vital features of the

formula which the Commission adopted were grossly unreasonable and unjust to E-L. The formula is summarized in the majority opinion of the Court at pages A-11, 12,[4a] but that summary does not so much as refer to E-L's objections that the use of E-L's freight revenues for 1964 to obtain its "base revenue ratio" is unjust, and that the reason which the Commission gave in its Report for using 1964 revenues is so plainly contrary to the facts that it is inexplicable. Neither does the opinion make any reference to the objections of E-L, D&H and B&M that the Commission's use, in the final step, of "the difference between 100% and the protected carrier's average freight operating ratio for 1962-65", is palpably unjust, and that the injustice appears from a statement made elsewhere in the Report.[5]

The period between the issuance on April 27 of the Report dated April 6 and the commencement of E-L's action on September 8.

The time to file petitions for reconsideration, rehearing and other relief under the Commission's Rules expired on July 11 after two extensions had been granted by the Commission.

On July 8 E-L filed a detailed petition which is correctly characterized in the dissenting opinion (p. A-45):

> "The three 'protected' lines, E-L, D&H and B&M, challenged the traffic conditions as totally ineffective to achieve their intended purpose; they detailed their specific objections in comprehensive briefs filed with the Commission. They also attacked the indemnification terms as based upon an improper formula."

[4a] As stated above, all page references to the opinions below are to the pages of the opinions, A-1 to A-65, as printed as Appendix A to the Jurisdictional Statement on the appeal of The Baltimore and Ohio Railroad Company, et al.

[5] E-L's objections to the provisions of the Commission's formula relating to the "base revenue ratio" and the "indemnification factor" are set forth in E-L's complaint in paragraphs 9(b)(1) and 9(b)(2) at pages 7-9.

All replies to the petition except one were filed by August 1; that of the Department of Justice was filed by August 8.

The Commission took no action with respect to the petitions for reconsideration and other relief until its Report of September 16, which was released September 19.

In the meantime, E-L attempted, by more than one petition, to have the effective date of the Commission's Order of April 6 postponed until a date that would be a reasonable but adequate number of days after the Commission had acted on the petitions. E-L's efforts were unsuccessful and the Commission's successive Orders relating to the effective date always specified a particular day, the latest being September 30. As a result, by September 7 E-L concluded that unless it was willing to clearly lose or gravely jeopardize its right to a judicial review, it would have to commence an action to enjoin or set aside the Commission's Order of April 6—even though the Commission had not yet acted on E-L's petition for reconsideration, rehearing, etc. —and its action was commenced on September 8.

The protective conditions were not the only subjects covered by E-L's petition for reconsideration, but the Commission's Report of September 16 and the opinions below put greater emphasis on the protective conditions than on any other subject, and anything to be said herein about other matters will be deferred.

Developments between September 8, when E-L's action was started, and October 4, when the decision of the Court below was handed down.

On September 12 two other actions were commenced in the same District Court by (1) The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company and Norfolk and Western Railway Company, and (2) The Central Railroad Company of New Jersey and

Reading Company. The three actions are respectively numbered in the District Court 66 Civ. 2860; 66 Civ. 2903; and 66 Civ. 2914.

Motions that a District Court of three Judges be assembled and convened, as provided in 28 U.S.C. § 2284(1), were duly granted by orders entered on September 13 and 14. On the latter date the three actions were consolidated for all purposes, and on that date also the Chief Judge of the Court of Appeals for the Second Circuit designated the Honorable Henry J. Friendly, Circuit Judge, and the Honorable Edward Weinfeld, District Judge, to serve with the Honorable Richard H. Levet, District Judge, who became a member of the three-Judge Court under 28 U.S.C. § 2284(1).

Motions for temporary restraining orders in the three actions (or in the consolidated action) were put over by Judge Levet, to be heard on September 21 by the three-Judge Court with the motions for an interlocutory injunction.

On September 19, two days before the motions were to be argued before the three-Judge Court, the Commission released its Report and Order dated September 16, in which it stated its belief that "prompt consummation of the merger clearly would be in the public interest" (p. 11-13; p. B-13 to 16).

With respect to the protective conditions the Report of September 16 said (p. 37; p. B-41):

> "On reconsideration, we are persuaded, however, that certain modifications of appendix G may be desirable. *The three protected carriers, on petition, have raised valid issues as to interpretation, application, scope, and other aspects of the protection.*"

And at p. 41 (p. B-45):

> "We find that the matters raised on petition regarding the terms and protections of appendix G of the

prior report and order, and the matter of capital loss indemnification, warrant further hearing and further consideration, * * * ."

The Commission directed a further hearing, and the Report of September 16 (which was incorporated in the Order of that date by reference) provided as to the protective conditions:

1. TRAFFIC CONDITIONS:

Modifications of the traffic conditions are to be considered at the "further hearing" (p. 39-40; p. B-44), and "such modification thereof as may be found appropriate will be made effective as of the date prescribed in the modification order" (p. 40; p. B-43, 44).

In the meantime, "all traffic conditions will remain in effect, whether imposed through appendix G or elsewhere in the prior report" (p. 39; p. B-43).

2. INDEMNIFICATION CONDITION:

"* * * the indemnity provisions of appendix G, viz., paragraphs 3, 5C and all other provisions therein dealing with indemnity payments be, and they are hereby, rescinded" (p. 39; p. B-43, 44).

However, "all the provisions of appendix G will be subject to the further hearing and further consideration" (p. 39-40; p. B-44).

And "any provision which may be decided upon for the payment of indemnity will be made applicable retroactively to the date the merger is consummated" (p. 40; p. B-44).

The requests for what the Commission called capital loss indemnification, which has been referred to herein as the capital loss indemnity in order to avoid confusion with the indemnification condition as defined at page 13 above,

will also be the subject of the further hearing. For the reasons stated at pages 13-14, that subject will not be adverted to herein.

On September 30 the Commission released an Order dated September 29, which is referred to in both of the opinions below, providing for a further hearing, to commence on October 31, pursuant to its Report and Order of September 16 (Appendix C to the Jurisdictional Statement on the appeal of The Baltimore and Ohio Railroad Company, et al.).

POINT I.

An analysis of Judge Weinfeld's dissenting opinion, against the background of the undisputed facts, establishes that this appeal is one which merits a full hearing by the Court.

That is confirmed by certain comments in the majority opinion about the dissent, and conflicts between the two opinions.

The merger will be the greatest in the history of the railroad industry, if not in that of all American industry.

Its *potentially* damaging, not to say catastrophic, effects on E-L, D&H and B&M are the subject of explicit findings by the Commission which are quoted above at page 12 and in the dissenting opinion at pages A-42 and A-43.

As all of the Judges below agreed (see below, p. 56), a consummated merger will be irreversible. All of the members of the Court below were unimpressed, and rightly so, by arguments on behalf of the Railroad Companies that the merger could be unscrambled by a "dissolution".

After the Commission's April 6 Report was released on April 27, E-L made every possible effort to obtain appropriate relief *from the Commission*. Its petition for reconsideration, rehearing and other relief (Exhibit E to E-L's complaint below) was filed on July 8 but not acted upon in

any way until the Commission's Report of September 16 was released on September 19, eleven days after E-L had felt compelled to start its action because its efforts to have the effective date of the April 6 Order (September 30) changed were unsuccessful—and two days before the argument in the three-Judge Court.

The appeal involves the public interest:

Two of the three findings which we have quoted at page 12 mention specifically the service rendered by "the protected carriers" to shippers and one speaks of the service to the carriers' "connections". Section 8 of Appendix G refers to "the shipping public which depends upon them for transportation" (327 I.C.C. at 563). The Commission's conclusion in the April 6 Report that it would not authorize consummation of the merger unless the protected carriers were "protected during the period necessary to determine their future" was plainly attributable to its appraisal of the public interest.

A second, and not less important, respect in which this appeal involves the public interest is that it presents important questions as to the interpretation and application of Federal statutes in three areas: (1) compliance by the Commission with Section 5(2) of the Interstate Commerce Act, (2) compliance by the Commission with the procedural requirements of the Fifth Amendment to the United States Constitution and the Administrative Procedure Act and (3) effective judicial review of Commission orders which approve transactions under Section 5(2).

The dissenting opinion.

It would be supererogatory, not to say presumptuous, to cover in this Statement the same ground which Judge Weinfeld has covered in his opinion.

This Statement will (1) note in this Point certain comments in the majority opinion about the dissent and certain conflicts between the two opinions, (2) set forth other grounds for a reversal of the order below which Judge Weinfeld did not mention (or, if mentioned, were not stated by him as a basis for reversal) and (3) to a very limited extent supplement points made in Judge Weinfeld's opinion.

The "vital findings."

The majority opinion says (p. A-24, 25):

> *"The vital findings from which we would not allow the Commission to depart, at least without complete explanation,* are that 'impairment or serious weakening' of any of the three carriers by the merger would be contrary to the public interest, that these carriers would be impaired or seriously weakened pending inclusion in a larger system unless something more than the standard traffic conditions were imposed, and that special interim conditions of some sort must be devised 'to obviate impairment or serious weakening of E-L, D&H or B&M, or the rendering of them individually or collectively substantially less capable of providing service to their shippers and connections.' 327 I.C.C. 531-32."

Judge Weinfeld quoted this and said that the majority's distinction between "vital" and other findings disregards the Commission's own findings (p. A-50). We ask:

What is the meaning of the words "from which we would not allow the Commission to depart, at least without complete explanation"?

How would the three-Judge Court control what the Commission does after the merger has been consummated? The majority opinion suggests that, if the Commission should issue an order after a rehearing relating to the protective conditions and E-L should seek a judicial review,

it is "by no means likely" that the Court would grant any relief (p. A-36), in view of "the technical nature of the subject-matter."

Would the Court consider a long explanation by the Commission "complete", even if it were unsound?

The Commission's power to defer, until after the consummation of a merger, the determination of the protective conditions.

The majority and the dissenting Judge differed sharply as to the power of the Commission to defer the determination of the protective conditions until after consummation of the merger.

The majority opinion discusses this subject at pages A-22 to A-26 and the dissenting opinion at pages A-49 to A-57.

Certain things are clear:

The Commission's power under Section 5(2)(b) to prescribe "just and reasonable" terms and conditions must not be so restricted as to make it impossible for the Commission to do effectively what Section 5(2) contemplates that it should do.

On the other hand, the Commission does not have an unfettered power to authorize the consummation of a merger and leave the determination of just and reasonable terms and conditions to post-merger proceedings. See *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156, 167-168 (1962).

What the Commission has undertaken to do with respect to the protective conditions in this instance is absolutely unprecedented. It is in no sense comparable with what the Commission has done (largely without objection) in other Section 5(2) proceedings and what its Reports and Orders

relating to the Penn-Central merger provide as to other matters.

The only reasonable interpretation of the findings in the April 6 Report is that (1) adequate protective conditions are a *sine qua non* of the merger and (2) the protective conditions prescribed in the April 6 Report were considered by the Commission to be adequate when that Report was issued.

The September 16 Report did not modify the April 6 findings as to the necessity of adequate protective conditions. However, by the clearest implication, if not explicitly, it found that the original conditions at least "left something to be desired" and that "the objections advanced by the independent carriers were of substance", as Judge Weinfeld said (p. A-61). And the Commission very largely left the fashioning of adequate conditions for post-merger determination, leaving in effect for the interim the traffic conditions to which serious objections had been made (see below, p. 24, 42).

The majority opinion suggests that all will yet be well. We hope that that will prove to be true. But it is another matter to assert that there is anything apporaching a reasonable assurance of that outcome, if the three-Judge Court should be sustained. Certainly the majority opinion provides no such assurance.

If the presumption of the Commission's expertise—as to railroads, law and procedures—is as powerful and pervasive as the majority suggests, we cannot see its limit.

E-L does not mean to be *generally* critical of the Commission. The action which E-L commenced and this appeal involve principally what the Commission did, and left undone, in this matter after the April 6 Report was issued. E-L's petition for reconsideration, rehearing, etc. of July 8 (Exhibit E to E-L's complaint) was filed with the Commis-

sion on July 8, and all replies except one were on file by August 1, but E-L received no word of Commission action until September 19, when the Report of September 16 was served. The majority opinion of the Court contains complimentary references to the petitions of the "protected carriers" (see below, p. 40, footnote 12), but the hard and inescapable fact is that the Commission's Report of September 16 did not undertake to answer *any* of E-L's objections to the prescribed protective conditions.

The majority's optimism that all will yet be well appears to be based on two premises.

The first is that the Commission's task on the rehearing will be relatively simple. If so, why did not the Commission do more than it did between July 8 and September 16? The fact is that the fashioning of adequate protective conditions is not simple (p. 45).

The second premise is that the Commission's expertise is such that in a matter of this kind everything can be left to the Commission even though a consummation of the merger would make an effective judicial review most difficult, if not impossible—probably dependent upon what Judge Weinfeld called "a gentle nudging of the Commission" (p. A-60).

We will show later why we think that neither of these premises is sound.

The time factors.

One of the most conspicuous differences between the two opinions involves

1. The time required for the rehearing and any modification order.

2. The delay in the consummation of the merger which would result from an interlocutory injunction.

Judge Weinfeld saw "no reason why a [Commission] report cannot be rendered reasonably soon after commencement of the hearing or by the end of the year" and spoke of "a slight delay beyond November 1", which, according to the two Railroad Companies, is the first day on which the merger could be consummated if there were no order restraining its consummation (p. A-64, 65).

The majority said that Judge Weinfeld's estimate "regrettably does not jibe with the hard facts of life" (p. A-33). But the majority itself said twice that the modification order could surely be entered "by the spring of 1967" (p. A-32).

The difference between the end of 1966 and the spring of 1967 would hardly seem to be of decisive importance.

The outstanding difference between the two opinions is that Judge Weinfeld did not undertake to forecast what would happen after a modification order was entered by the Commission but the majority did. Taking into account "the near inevitability of requests for reconsideration" and "renewed court proceedings" (p. A-32), it concluded that "any realistic estimate of delay of consummation from an injunction pending reconsideration would take us to the end of 1967" (p. A-33).

Certain features of the majority opinion are worthy of particular comment:

1. There is no real discussion of the issue raised by the so-called "unprotected carriers" as to the legality of any condition of the type of the indemnification condition (p. A-26, 27).

2. As already noted, the majority has taken "account of the near inevitability of requests for reconsideration of the modified conditions and renewed court proceedings" (p. A-32) as the basis for its "realistic estimate of delay of consummation from an injunction pending reconsideration" (p. A-33).

3. Yet the majority assumes that the Commission, on a rehearing, will do its difficult job so superbly that no one should take seriously "an argument that the new conditions may be so weak as to imperil the three carriers or so strong as appreciably to injure others during that period" (p. A-33, footnote 13).

4. When the opinion speaks of the jeopardy of the "protected carriers", the time forecast seems to be quite different from that of "delay of consummation from an injunction pending reconsideration." The opinion speaks of "the next few months" as the period during which the protected carriers would be protected only by the present traffic conditions (p. A-30), but forecasts that an injunction "would take us to the end of 1967" (p. A-33) and speaks of a delay "for a year or more" (p. A-37).

5. In no place does the majority opinion take into account that an interlocutory injunction can be lifted at any time if developments after it has been issued make it suitable to lift it.

The respective functions of the Commission and the Court.

The dissenting and majority opinions present a sharp contrast in the views that they reflect as to the respective functions of the Commission and the Court.

The dissenting opinion clearly recognizes that the Commission has the primary responsibility with respect to a railroad merger, but it is implicit throughout the opinion that the Commission is governed by the applicable provisions

of the Interstate Commerce Act and the Administrative Procedure Act.

While the majority's opinion contains modest disavo als of any expertise and of any right to base a decision on their own judgment, actually the majority decision is not based on the reasons which the Commission gave for its conclusion that a prompt consummation of the merger would be in the public interest, but largely on various beliefs, suppositions and conjectures that are not supported by anything in the Commission's Reports or in the record (see below at pages 27-40 and 46-50).

POINT II

Three important reasons which the Commission gave in its Report on Reconsideration of September 16 for a prompt merger were clearly untenable and the Commission's findings relating to them were arbitrary and capricious.

While the Commission's errors with respect to all three were pointed out to the three-Judge Court, the majority opinion does not mention two of the three and, while agreeing that there was an error with respect to the third, the majority was apparently uninfluenced by that error.

The crucial issue before the Commission in 1966 was whether or not there should be a "prompt consummation of the merger" or whether the merger should be deferred until adequate conditions had been determined upon for the protection of E-L, D&H and B&M. And the timing of the consummation was the issue on the motions for an interlocutory injunction in the three-Judge Court.

In the section of the Report on Reconsideration of September 16 entitled "TIME OF CONSUMMATION" (p. 11-13; p. B-13 to 16) the Commission stated its reasons for concluding "that the public interest requires prompt consummation of the proposed merger".

While other portions of the Report should not be disregarded, it was in this section that the Commission undertook to comply with the requirement of the last sentence of Section 8(b) of the Administrative Procedure Act for a statement of "reasons". Indeed, the section both opened (p. 11; p. B-13) and ended (p. 13; p. B-16) by saying that the section at pages 11-13 of the Report (p. B-13 to 16) contained the "reasons" for approving prompt consummation of the merger.

As was pointed out to the three-Judge Court, the Commission did not state correctly the choice before it. It spoke as if that choice was between a delay of "several years" or immediate consummation of the merger.[5]

A. The Commission's finding that the Penn and Central are in a "vulnerable and highly sensitive financial situation" was in conspicuous conflict with the facts, arbitrary and capricious.

In discussing the reasons for a prompt consummation of the merger the Commission referred at page 11 of the Report of September 16 (p. B-13) to "the applicants' financial situation during the past decade and the fact that they, like the rest of American industry, are not assured of continuous operations at the 1966 level." Earlier in the same Report it had repeated a summary from the Report of April 6 in which it had referred to the applicants' "vulnerable and highly sensitive financial situation" (p. 7; p. B-9). Taken together, these two statements in the Report of

[5]Both of the opinions below dealt with the alternatives more realistically. We will not undertake to discuss herein the differences between the two opinions and will limit ourselves to observing that both recognize that the choice was not one between a deferment of several years and an immediate merger. It is nevertheless significant that the Commission's Report on Reconsideration reads as if those were the alternatives.

September 16 can only mean that as of that date the Commission found the applicants' *"vulnerable and highly sensitive financial situation"* to be one of the reasons for a prompt consummation of the merger.

It is difficult to imagine a more extraordinary finding. Some of the pertinent facts are as follows:

> In 1965 the combined consolidated net income of the two companies and their consolidated subsidiaries was $122,469,097.[6]
>
> In 1961, the last calendar year preceding the filing of the merger application, the combined consolidated net income of the Penn and its consolidated subsidiaries and the Central and its consolidated subsidiaries was only $4,745,002.
>
> There was a substantial increase in the earnings in *each* of the years 1962 through 1965—that is to say, in the consolidated net income of the Penn and in the consolidated net income of the Central in each year.

The upward spirals of the earnings per share are shown later in another connection (p. 36).

As stated at page 36, the Pennsylvania's net income for the first 6 months of 1966 was 32.61% more than for the first 6 months of 1965 and the Central's was 80.12% more.[7]

Immediately before speaking of the "vulnerable and highly sensitive financial situation" of the two Railroad Companies, the April 6 Report referred to the C&O-B&O

---

[6] All of the figures given or referred to in this Point are either in, or are computed from, Reports on file with the Commission and are part of the record.

[7] These are not on a consolidated basis. The Central does not release consolidated figures for portions of a year and the Reports which have to be filed with the Commission during the year do not contain consolidated figures.

unification and the merger of "N&W-Nickel Plate, et cetera" (p. 519). The Commission considered it to be too early "to fully assess the effects those transactions have upon PRR and NYC", although the later of the two was consummated on October 16, 1964. It was in the light of those earlier unifications, the effects of which the Commission could not "fully assess", and the applicants' "vulnerable and highly sensitive financial situation" that the Commission found in its Report of September 16 that the "applicants, if required to continue as independent lines, could not keep pace with their common carrier obligations" (p. 7; p. B-9).

Yet, despite the creation of the C&O-B&O System and the enlarged N&W System, each of the applicants has increased its income (whether on a "company" basis or a "consolidated" basis) dramatically year-by-year. And each did better in the first six months of 1966 than in the first six months of 1965.

E-L does *not* contend that the two Railroad Companies should not be permitted to merge because they have done so splendidly without merger.

E-L does contend that the Commission's finding as to the "vulnerable and highly sensitive financial situation" of the applicants is in conspicuous conflict with the facts, arbitrary and capricious, and that the Court below should have so held.

All of the foregoing was called to the attention of the three-Judge Court and E-L explicitly contended that the Commission's finding could not be sustained for the reasons above set forth. Yet the only reference in the majority opinion below to the extraordinary record of the Railroad Companies over a period of more than five years is an oblique one at page A-19, where there is a sentence which merely mentions "the marked recent improvement in the applicants' earnings".

B. The Commission erred in concluding that any delay in the consummation of the merger would imperil or seriously delay the New Haven's inclusion in the Penn-Central System.

All of the Judges of the three-Judge Court apparently were in agreement that the Commission was in error, but the majority did not consider to what extent the Commission's error had influenced its conclusion that there should be a prompt consummation of the merger.

One of the reasons which the Commission emphasized in its Report of September 16 for "prompt consummation of the proposed merger" was its belief that a delay in the Penn-Central merger would imperil the eventual inclusion of the New Haven in the Penn-Central System.

A supposition that a delay in the consummation of the Penn-Central merger would prejudice a solution of the New Haven's problems was undoubtedly the principal reason why three New England States and New York opposed the granting of an interlocutory injunction.

The Commission said at page 13 (p. B-15 to 16):

> "Inclusion of New Haven's vital passenger and freight operations in the merged company, as we have provided, is the only solution which has been proposed for continuance of that bankrupt carrier's operations. Although the applicants have agreed to such inclusion, we cannot predict the date upon which such actual inclusion will occur.
>
> * * * * *
>
> "Absent the applicants' merger we see no solution to the New Haven problem. Certainly, neither of the applicants separately can be required to take over New Haven's deficit-ridden operations. We are not prepared to take this risk involved in a substantial postponement of consummation of the merger. Moreover, we are not prepared to take the risks which delay of

consummation of even six or twelve months might entail in providing a solution of the New Haven problem other than liquidation."

The Commission's belief that any delay would imperil the New Haven's inclusion in the Penn-Central System was a direct result of its failure to obtain more information than it had. In E-L's petition for reconsideration and other relief of July 8, a copy of which is Exhibit E to E-L's complaint, E-L discussed the New Haven in considerable detail (p. 81-92), because E-L's interest in having satisfactory protective conditions determined upon before the Penn-Central merger was consummated would conflict with the New Haven's interest in having an immediate or early consummation of the Penn-Central merger if delay in the consummation of the Penn-Central merger would imperil the ultimate inclusion of the New Haven in the Penn-Central System.

The situation was complicated because of E-L's inability to find out about (1) the procedure which the New Haven Trustees proposed to follow in order to effectuate a plan of reorganization under § 77 of the Bankruptcy Act and (2) any agreement, or negotiations toward an agreement, consistent with Section 8 of Appendix A to the Report of April 6 (327 I.C.C. at 553). Hence E-L's petition of July 8 contained something in the nature of an exploration of the New Haven situation in the light of the requirements of § 77 of the Bankruptcy Act rather than a positive showing that a reasonable delay of the Penn-Central merger would not complicate the New Haven's problems.

The last paragraph of the Point relating to the New Haven in E-L's petition of July 8 therefore read as follows (p. 92):

> "The uncertainties about the New Haven constitute a strong additional reason why the consummation of the Penn-Central merger should be deferred until the Commission is better informed than it is now; can

exercise its judgment in the light of fuller information; and can make more informative findings than it was able to make on April 6, 1966, or can make now."[9]

E-L's suggestion was not accepted, and the Commission's comments about "the risks" of a delay "of even six or twelve months" (p. 31-32 above) are attributable to its inadequate information.

However, as a result of the material which was submitted to the three-Judge Court and what was said on the oral argument on September 21—including answers to questions put by members of the Court—there now appears to be complete unanimity in the Court that the granting of the motion for an interlocutory injunction would not imperil or even seriously delay the New Haven's inclusion in the Penn-Central System when formed.

This subject is discussed in the majority opinion at pages A-20 to A-22. We quote from page A-21:

> "If a temporary injunction would imperil or even seriously delay NH's inclusion, this would indeed weigh most heavily against it. *We find no likelihood of a delay.*"

Judge Weinfeld's dissenting opinion contains the following paragraph (A-62, 63):

> "The dire consequences foreseen by some for the bankrupt New Haven hardly finds support in the facts. The estimates of time required for negotiations among the various parties and necessary activities to conclude statutory approval by both the Commission and the reorganization court extend up to a two-year period. As New Haven representatives candidly conceded upon

[9] The Commission treated what E-L had to say in its decision of July 8 as a demand that the Penn-Central merger be delayed "in order to *settle*" the procedural questions raised by E-L or others (September 16 Report, p. 22, 23; p. B-25 to 27). As will appear from the quotation just given, E-L did not ask that anything be *settled*; it merely asked that the Commission learn more about the subject before reaching a conclusion which might affect E-L adversely and seriously.

argument, there is no reason why these activities cannot run apace while the Commission reconsiders and finally determines the protective requirements issues."

When deciding in favor of "prompt consummation" of the merger, the Commission clearly gave substantial weight to an erroneous belief or supposition relating to the New Haven. Yet, although the three-Judge Court unanimously found that the Commission's belief or supposition was erroneous, the majority gave no weight to the Commission's plain error.

C. The Commission erred in giving weight to the possibility that changes in conditions would make the stock ratio provided for in the merger plan unfair and thus block the merger.

The majority of the three-Judge Court should have taken the Commission's error into account.

One of the reasons given by the Commission in the Report of September 16 for a prompt consummation of the merger was as follows (p. 13; p. B-15):

> "If consummation of the applicants' merger is deferred several years or indefinitely, we can have no assurance that it will ever occur. The factors that enter into an agreement to merge sooner or later can be affected by changing conditions."

As has already been noted, the Commission was not concerned with any deferment for "several years", and any disadvantages or dangers of an "indefinite" postponement obviously depend upon how long it would be.

When the Commission referred to "factors that enter into an agreement to merge" it was undoubtedly adopting the following argument which was made by the New Haven.

Trustees in their reply of July 29, 1966 to the petitions for reconsideration (p. 1-2):

> "* * * any indefinite or prolonged stay threatens the merger itself for the reason that no merger plan, and specifically one involving an exchange ratio, can indefinitely reflect the relative values of the separate companies being merged."

Upon the argument before the three-Judge Court counsel for the New Haven Trustees became more specific, saying (Tr. 152-153):

> "* * * This case now has been four years with a stock ratio of 1.3 to 1, that is 1.3 shares of Penn stock for 1 share of Central stock, that very simple ratio remaining without attack by the whole myriad of stockholders of those two companies. *The circumstances haven't changed.* They can change tomorrow in either way, for better or worse, which affects the ratio."

We know of no proposed railroad merger which has failed because of changes in circumstances after the original approval of the merger agreement by the stockholders of the companies involved. No example has been cited. In the case of the Atlantic Coast Line-Seaboard Air Line merger, the merger agreement was adopted on May 19, 1960 and will be carried out if a pending appeal to this Court is unsuccessful.

The statement made with reference to the Penn and the Central that *"The circumstances haven't changed"* was as surprising as it was incorrect. E-L's petition of July 8 quoted from the Proxy Statement of June 10, 1966 which the Penn distributed in connection with its Special Meeting of Stockholders held on July 21, 1966. It showed that the consolidated net income per share of stock of the Penn and

Central for each of the years 1961-1965 was as follows (the Central figure for 1961 being a deficit):

Year	Pennsylvania	Central
1961.....	$1.31	$(1.91)
1962.....	1.53	0.03
1963.....	2.35	2.11
1964.....	4.37	5.34
1965.....	5.06	7.64

The Penn's improvement from 1961 through 1965 was $3.75 a share and the Central's was $9.55 a share.[10]

The Form IBS Reports of the two Railroad Companies show that the Penn's net income for the first six months of 1966 was 32.61% more than for the first six months of 1965 and the Central's was 80.12% more.[11]

The proposed merger was resubmitted to the Penn and Central stockholders on July 21, 1966 and again assented to after a disclosure to them of the financial results of the operations of the two Companies on "company" and "consolidated" bases in conformity with S.E.C. requirements.

Instead of it being the case that "The circumstances haven't changed", as counsel for the New Haven Trustees said on the argument, it is indisputable that over the four years 1962-1965 they changed drastically and the trend of the changes continued over the first six months of 1966, but despite this the stockholders of the two Railroad Companies assented again in July, 1966 to the terms which had been agreed upon four and one-half years before. The risk that

[10] The changes cannot be expressed in percentages, starting with 1961, because the Central had a deficit in that year. It would be ridiculous to use the Central's 1962 earnings of 3¢ a share as a base in computing a percentage improvement.

[11] The transcript of the argument of E-L's counsel on September 21 at page 53 gives 62% for the Pennsylvania; the correct figure is 32.61%.

changes in the foreseeable future would upset the merger is so miniscule as not to be entitled to any consideration.

Furthermore, we have found no provision in the Joint Agreement of Merger, a copy of which is attached to the Joint Application in Finance Docket No. 21989, that authorizes either the directors or the stockholders of one of the two companies to have the merger abandoned because of a change in circumstances.

In view of the foregoing it seems to E-L arbitrary and capricious for the Commission to have given the slightest weight to any possibility that changing conditions can so affect the "factors" that entered into the agreement of the Penn and Central to merge as to terminate their effort to merge under the present merger agreement, when the issue involved the consistency with the public interest of "prompt consummation of the merger" under the circumstances which exist in this case.

All of the above was called to the attention of the three-Judge Court by E-L substantially as it is presented here. No reference thereto has been found in the majority opinion.

Summary.

The foregoing three reasons, to be found at pages 11-13 of the Report of September 16 (p. B-13 to 16) for the Commission's decision in favor of a prompt consummation of the proposed merger were all important. The majority opinion did not repeat the Commission's errors. *It merely gave no weight to the fact that three of the reasons which the Commission had given to meet the requirements of the Administrative Procedure Act, for a prompt consummation of the merger, were plainly unsound.*

On how many supposed pillars did the Commission's decision in favor of a prompt consummation of the proposed merger stand? When three are shown to have been plainly unsound, should a reviewing Court assume that the other pillars are enough or provide pillars of its own? It is submitted that the answer is that it should not. But that is not all.

POINT III.

A fourth reason which the Commission gave in the September 16 Report for approving a prompt consummation of the merger was its provision for the conditions prescribed in Appendix G to the April 6 Report. Nevertheless, later on in the September 16 Report the Commission eliminated that reason.

Furthermore, there are important holdings in the majority opinion, relating to the traffic conditions, which are clearly erroneous.

At pages 11-12 of the September 16 Report (p. B-13 to 14), in the statement of its reasons for approving a prompt consummation of the merger, the Commission said it had taken "two major steps", one of which it described as follows (p. 12; p. B-14):

> "* * * (2) we have imposed in appendix G to the prior report (and applicants have accepted) unique conditions designed to maintain the traffic status quo for these three railroads pending final determination of their inclusion petitions; * * *"

But what the Commission said at page 12 (p. B-14) it had given to E-L, D&H and B&M it took away at pages 37-41 (p. B-41 to 45), where it provided, in ordering a rehearing (see above, p. 18), that

> 1. The traffic conditions in Appendix G may be modified, the modification to be effective "as of the date prescribed in a modification order".

2. The indemnification condition in Appendix G, "paragraphs 3, 5C and all other provisions therein dealing with indemnity payments", are "rescinded" but may be reinstated in their original or a different form (with differences in substance) retroactively to the date of consummation. Or there may be no indemnification condition at all.

The majority opinion rests heavily on the proposition that after the further hearing the Commission will provide *modified* traffic conditions which, together with a new indemnification if one be approved, will be "just and reasonable" and will afford E-L, D&H and B&M the protection which the Commission has found to be necessary in the public interest. Judge Weinfeld's answer is at pages A-57 to A-61 of his opinion and we will not add to it. We will, however, quote a sentence from page A-59:

> "None can divine what modifications will be made in traffic conditions, or whether the indemnification requirement will be continued at all, or the nature, duration or scope of any revisions of or additions to either, both or any of the requirements enumerated in Appendix G."

It is undisputed that until the traffic conditions are modified and the date prescribed in the modification order is reached, the present traffic conditions in Appendix G will be operative. Furthermore, they will be the only restrictions on diversionary practices on the part of the merged company. A practice followed in the period when the present traffic conditions are in effect may have permanent as well as temporary results, since shippers diverted to the merged company may well stay with it. Modifications of the traffic conditions are not to be retroactive and could not well be.

The contentions of E-L and others that the traffic conditions now contained in Appendix G may be expected to be ineffective were therefore important because (1) the traffic conditions were concededly adopted without notice and (2) consummation of the merger with substantially ineffective traffic conditions will cause irreparable damage to E-L (see p. 51-54).

We will therefore comment on certain statements in the majority opinion about the present traffic conditions, and what they will accomplish during the period until the date of any modification.

1.

The majority opinion states that the "criticisms proffered by the protected roads scarcely claimed [that the initial traffic conditions were ineffective] but rather proposed ways to make them still more effective which the Commission now intends to explore" (p. A-29). This statement is incorrect. It is difficult to reconcile it with other statements in the majority opinion[12], and impossible to reconcile it with what is to be found in the dissenting opinion or in the record.

The dissenting opinion states (p. A-45):

> "The three 'protected' lines, E-L, D&H and B&M, challenged the traffic conditions as totally ineffective to achieve their intended purpose; they detailed their specific objections in comprehensive briefs filed with the Commission."

---

[12] At page A-12 the majority opinion says that:

"The protected carriers assailed the traffic and financial conditions as vague and insufficient in respects too numerous to mention."

At page A-31 the opinion states that "the full and helpful criticisms by the protected roads have already been in the Commission's hands for three months."

At page A-37 the majority congratulated the Commission for "its willingness to take a fresh look * * * when significant objections were offered".

At page A-48 of the dissenting opinion Judge Weinfeld referred to "the traffic conditions, challenged as inadequate and now subject to complete revision".

Finally, at page A-61 Judge Weinfeld said:

> "The protected carriers challenge the adequacy of this interim protection, stressing, particularly with respect to the traffic conditions, the same matters they previously urged required reconsideration of Appendix G."

In E-L's petition for reconsideration and other relief of July 8, which is Exhibit E to E-L's complaint, the portions of Appendix G which related *solely* to the traffic conditions were discussed at page 17 and in Appendices 1 and 2 to the petition, the two Appendices being 44 pages long. The *force majeure* clause, Section 4 of Appendix G, was dealt with at pages 33-36 of the petition. The interpretation and enforcement provisions, which for the most part apply to the traffic conditions, were discussed at pages 37-45. These can all be examined in Exhibit E to E-L's complaint.

We are simply at a loss to understand how the statement on page A-29 of the majority opinion, that the traffic conditions were not objected to as ineffective, came to be made.

2.

At page A-22 the majority opinion says, with respect to the protection afforded to E-L, D&H and B&M by the present traffic conditions (prior to any modification):

> "We see no force in the point that the special traffic conditions will subsist pending further order; these conditions, designed to preserve the pre-merger *status quo*, can only help the protected roads * * *."

What this means is that E-L, D&H and B&M will be better off with the present traffic conditions until they are

modified than they would be if there were no traffic conditions at all. That is beside the point.

The significant findings quoted above at page 12 and pages A-42 to A-44 of the dissenting opinion are substantially to the effect that E-L, D&H and B&M should be protected after the merger. The question is not whether they will be better off with defective traffic conditions than they would be if they had no traffic conditions at all. The question is whether they will have the protection which the Commission found that they should have.

3.

At page A-28 the majority opinion says:

> "The three carriers have made no showing that would have led us to enjoin consummation of the merger if the Commission had been satisfied with the special traffic conditions in Appendix G, themselves going far beyond anything in previous history.[10]"

The footnote, which is too long to quote in full, starts with a quotation of what is said to be the "basic mandate". The quotation is from the first paragraph of Section 1 of Appendix G (327 I.C.C. at 561), but it is a *partial* quotation, and what is omitted is very important.

While the footnote sets forth that the condition will apply "during the protective period", it contains no suggestion of the very serious objections that were made to the definition of the "protective period" (see pages 9-17 of Exhibit E to E-L's complaint).

Nor does the footnote quote, or in any way refer to, the qualifying words which limit the condition to "traffic for which E-L, D&H and B&M are competitive factors", or to the definition of the term "competitive factor" in Section

2 of Appendix G. The qualifying words in the first paragraph of Section 1, and the definition of "competitive factor" in Section 2, are crucially important provisions of Appendix G and were seriously objected to on grounds which have never been answered (see pages x-xvii of Appendix 2 to Exhibit E to E-L's complaint).

Whether or not the traffic conditions of Appendix G went "far beyond anything in previous history" is, of course, immaterial. No conditions of that type had ever been formulated before, and the question is whether or not they were adequate for the purposes for which they were intended.

Furthermore, the Commission was *not* satisfied with the traffic conditions itself.

4.

The Commission found in its Report on Reconsideration of September 16, at page 37 (p. B-41):

> "On reconsideration, we are persuaded, however, that certain modifications of appendix G may be desirable. *The three protected carriers, on petition, have raised valid issues as to interpretation, application, scope, and other aspects of the protection.*"

The Commission provided for a further hearing relating to the traffic conditions as well as the indemnification condition and the requested capital loss indemnity (p. 38, 39-40; p. B-42, 43-44). There cannot be any doubt that what the Commission said at page 37 (p. B-41) about "valid issues as to interpretation, application, scope, and other aspects of the protection" related to the traffic conditions as well as the indemnification condition.

In the light of what the Commission said, and what it provided with respect to a rehearing, clearly the net effect

of the Report of September 16 was that the traffic conditions were certainly or probably ineffective to accomplish the intended protection and should be modified.

Yet the majority opinion says at page A-29 in a passage which has already been quoted in part:

> "The Commission's report on reconsideration is in no way a finding that the initial traffic conditions were ineffective. A mere reading of their text is enough to belie any such view * * *".

The majority did not base their conclusion on an analysis of what the Commission said and did. *Nowhere does the majority opinion quote the Commission's statement at page 37 of the September 16 Report (p. B-41) which we have qnoted above and which is quoted in the dissenting opinion at page A-61.*

The statement that "a mere reading" of the text of the traffic conditions is enough to "belie" any view that the Commission's September 16 Report was in any way a finding that the initial traffic conditions were ineffective is startling for two reasons. First, the majority's reading of the text of the conditions could not alter what the Commission said and did by its September 16 Report. Second, a mere reading of the text of the conditions, as distinguished from a study of the text and of the objections which were made by the protected carriers, could not result in a considered judgment.

What is said in the dissenting opinion (p. A-61) is so much to the point that a quotation of it will make it unnecessary to discuss further the meaning of the Commission's Order of September 16:

> "But equally implicit in the Commission's order for reconsideration is a 'finding' that the protective conditions enumerated in Appendix G, and imposed therein

as an integrated unit, left something to be desired in the way of protection—that the objections advanced by the independent carriers were of substance. As much was acknowledged by the Commission when it noted that the three protected carriers 'have raised valid issues as to the interpretation, application, scope and other aspects of the protection.' "

The intrinsic difficulty of fashioning adequate protective conditions.

E-L's own lines of railroad cover a large territory which is now served directly by Penn or Central or both (see p. 8-9 above). Through connections E-L serves many other important areas which are also served directly or through connections by Penn or Central or both (*id.*).

To merge Penn and Central and also protect E-L is intrinsically difficult. It is not difficult to say "Penn and Central, you may merge but you must not divert traffic from E-L." It is another matter to prescribe *specific* conditions which protect E-L adequately, even if not completely.

The difficulties were revealed by portions of E-L's petition for reconsideration and other relief of July 8, which is Exhibit E to E-L's complaint (see above, p. 41). This Court cannot be asked to study such extensive and complex material. We feel entirely safe in saying that the Court below did not.

This Court can reach its own conclusion from the following:

If the fashioning of adequate protective conditions were not intrinsically difficult, the Commission could certainly have made any necessary changes in the Appendix G conditions between July 8, when E-L's petition was filed, and September 8, when E-L started its action.

When the Commission decided upon its Report and Order of September 16, it merely made the statement

quoted above at page 43 and took the action set forth at pages 18 and 43.

If, after examining the petition for reconsideration and replies, the Commission had adopted just and reasonable protective conditions, the whole problem as to the legality of the procedure for a post-merger hearing would have been eliminated, at least as to the protective conditions.

Supplementary comment.

The foregoing observations simply emphasize the correctness of the conclusion expressed by Judge Weinfeld at page A-59 of his opinion and quoted above at page 39.

"None can divine" the extent or the duration of the jeopardy to which E-L, D&H and B&M will be subjected if the Penn-Central merger be consummated under the Commission's Orders of April 6 and September 16.

POINT IV.

The majority opinion in the three-Judge Court was not based upon the reasons which the Commission had advanced for an early consummation of the merger.

It was based principally on the majority's own beliefs, suppositions and conjectures, which were not supported by anything in the record, much less by any Commission findings.

The outstanding characteristic of the majority opinion can be illustrated by analyzing what the opinion said immediately before the paragraph that stated the result and provided for the temporary restraining order (p. A-38, 39):

> "However, we are not truly empowered in this case to engage in the same kind of weighing and balancing and then making our own decision as to optimum procedure that we would be if we were reviewing the action of a lower court. It is not for us to deprecate the public and private advantages of permitting the

> applicants to proceed with the many important projects long on the drawing board whose importance to the national welfare and defense the Commission fully understands and we do not, or to magnify out of all proportion the immediate problems of the protected roads with which the Commission is fully familiar and entirely sympathetic. The Commission surely can appraise far better than we what effect a year's delay of consummation would have on the jockeying of these roads and of the three plaintiffs in the C&O, B&O, and N&W actions for price and position in respect of other mergers—which, despite all the words, is what we suspect these actions to be mostly about. We would be assuming powers not confided to us if, once we have acquitted ourselves of our limited task, we were to pit our necessarily ill-informed judgment on these imponderables and their procedural entailments against the unanimous conclusion of the agency to which Congress has given authority for decision and on which it has placed responsibility for achievement."

It is hardly necessary to do more than read what we have just quoted, and then read the section entitled "TIME OF CONSUMMATION" at pages 11-13 (p. B-13 to 16) of the September 16 Report, in order to be satisfied that the majority of the Court did not base its decision to permit a prompt consummation of the merger on the reasons given by the Commission but, despite its modest disavowals, made its decision in reliance on its own beliefs, suppositions and conjectures.

The Commission said nothing about "important projects long on the drawing board".

The Commission said nothing about the national defense.

So far as "the protected roads" are concerned, the Court was not called upon to "magnify out of all proportion [their] immediate problems" but merely to be guided by the findings of the Commission.

Perhaps the most extraordinary statement of all is that

> "The Commission surely can appraise far better than we what effect a year's delay of consummation would have on the jockeying of these roads and of the three plaintiffs in the C&O, B&O, and N&W actions for price and position in respect of other mergers—which, despite all the words, is what we suspect these actions to be mostly about."

What the Court called E-L's "jockeying" for "price and position" in respect of another merger consists of the steps which E-L has taken pursuant to paragraph 1 of Appendix O to the Commission's Order of June 24, 1964 under which, among other things, the Nickel Plate was merged into the Norfolk and Western (324 I.C.C. at 148; see above, p. 9-10). E-L was granted the right to do what it has done not only to allow "full exploitation of the plans thus far voluntarily developed by the Erie-Lackawanna and Norfolk & Western" but *"to afford the fullest protection to the public interest"* (324 I.C.C. at 28; 327 I.C.C. at 530).

When E-L found that the N&W would not discuss the terms of E-L's inclusion in the present N&W System but insisted upon its own program for an enlarged N&W-C&O System, in which E-L might be included (see above, p. 10), E-L did precisely what the Commission intended that it should do—it filed a petition in Finance Docket No. 21510.

Far from disapproving anything that E-L has done in this connection, the Commission emphasized E-L's rights under paragraph 1 of Appendix O both in the April 6 Report (327 I.C.C. at 530) and in the September 16 Report (p. 12; p. B-14).

If it be the fact—and there is nothing in the record in this case on which an assertion could be based that it is a fact—that the N&W has been "jockeying", why should E-L be penalized on that account?

Finally, can a reviewing Court properly make a determination based on what "we suspect these actions to be

mostly about", particularly when there is nothing to justify the suspicion and it happens to be wrong, at least in the case of E-L?

There are many other examples which could be given to illustrate what has been said in the heading of this Point. We will mention only three more.

1.

In footnote 4 at page A-10, the majority said:

> "* * * it is rather obvious that if N&W and the protected roads were to cooperate in arriving on terms by which N&W can fulfill its obligations, the protective period would be quite short. The State of New York, which is served by all three protected lines, as well as by the proposed merged carrier, argues with some plausibility that consummation of the merger would act as a spur to bringing these roads and the N&W together on a basis fair to all; the Commission could well have had that in mind when authorizing immediate consummation."

We repeat the question we have just asked: Why should E-L and the "shipping public which depends upon [E-L] for transportation"[18] be penalized because of any lack of cooperation on the part of N&W?

The argument which the majority considered had "some plausibility" was simply a notion advanced by counsel for the State of New York on the argument in the three-Judge Court. We do not find that the same counsel for the State of New York put forward such a notion in the State's reply, filed August 1 with the Commission, to the petitions for reconsideration. Nor have we found any suggestion, much less a finding by the Commission, that would support the characterization of counsel's notion as having "some plausibility".

---

[18] Commission Report of April 6, Appendix G, Sec. 8; 327 I.C.C. at 563.

2.

At page A-20 the majority opinion says:

> "The long delay to which the applicants have already been subjected argues strongly in favor of letting them get ahead with the job, as the Commission unanimously thought, rather than against it."

The use of the words "long delay" is certainly unclear. Do they imply that there has been unnecessary delay? The opinion is replete with compliments of the Commission under whose control the proceedings have been throughout.

We have found nothing in the Commission's Reports to indicate that the Commission thought that "the long delay to which the applicants have already been subjected argues strongly in favor of letting them get ahead with the job."

3.

At page A-38, when undertaking to appraise the "protected lines' " jeopardy, the majority spoke of "the minor share of their traffic that is in jeopardy" and "the negligible hazard even to that over the next few months".

There is no basis in the Commission's findings or the record for any statement that the share of E-L's traffic which could be diverted as a result of the Penn-Central merger is "minor". The Commission's findings are directly to the contrary. With respect to the possibilities of diversions from the protected carriers and the effects thereof, the words used by the Commission were "adversely affected * * * to a serious degree", "severely handicapped in providing required transportation", "serious weakening" and "substantially less capable of providing service" (see above p. 12).

As to the hazards, enough has already been said.

Comment.

It is submitted that an analysis of the majority opinion fully supports what is said in the title of this Point.

POINT V.

Appellant will suffer irreparable injury from an immediate consummation of the merger pursuant to the Commission's Orders of April 6 and September 16.

It is almost presumptuous to add anything to Judge Weinfeld's discussion of the strong case of irreparable injury which was made before the three-Judge Court by appellant, D&H and B&M (dissenting opinion, p. A-58 to A-61).

In considering the subject, a starting point is, of course, the group of findings which the Commission made in the April 6 Report and which are quoted at pages A-42 to 44 of the dissenting opinion (see above, p. 12).

Another starting point is that a consummation of the Penn-Central merger will be an irreversible event. Consequences will flow from it, and whether or not the detrimental consequences can be controlled to some extent, it will be impossible to undo the merger itself.

In view of the Commission's findings in its April 6 Report, which it has never modified, it is necessary to consider (1) what injury E-L may sustain before a modification of the present Appendix G traffic conditions becomes operative and (2) in what jeopardy E-L would stand after any modification of the traffic conditions shall have become operative.

(1)

As to injury to E-L before any modification of the traffic conditions becomes operative, three things may be noted:

First, as has been pointed out in Point III above, the present traffic conditions are not adequate to protect E-L.

Second, it is impossible to predict when any modified traffic conditions will become operative.

Third, there is no basis for a forecast whether the present traffic conditions will be supplemented by an indemnification condition retroactive to the date of consummation or, if so, what the terms of the indemnification condition will be.

In sum, E-L and the other protected carriers will be in jeopardy throughout a period of unknown duration while the present traffic conditions are operative.

Both the Commission in its September 16 Report (p. 12; p. B-14, 15) and the majority opinion (p. A-30) noted that "the task of implementing a merger of this size is so vast and complex that its competitive effects will only occur gradually", and the Commission quoted, and the majority opinion summarized, a statement made by E-L's Chairman and chief executive officer in F.D. No. 21510,[14] to the effect that E-L would not be substantially affected by a Penn-Central merger in the first year.

A finding that the competitive effects of the merger would "occur only gradually" does not mean that E-L would not suffer serious adverse effects before any modified traffic conditions became operative.

The protective conditions imposed by the Order of April 6 were to become effective immediately upon consummation of the merger. In issuing that Order the Commission obviously believed that immediate protection was essential—not protection which would commence within a year or such later time as it might take for the protected carriers to feel the full impact of the merger. Indeed, in Section 7 of Appendix G (327 I.C.C. at p. 563) the Commission provided that in the event of the Railroad Companies' failure to

[14] The N&W merger proceedings in which E-L has filed its petition for inclusion in the N&W System.

accede to the conditions of that Appendix, consummation of the proposed merger would be "deferred for 2 years or such time as the Commission may determine to be necessary to protect the interests of D&H, B&M and E-L".

If the Commission had believed that E-L and the other protected carriers would not suffer immediate harm from the merger and believed that it could frame and promulgate modified traffic conditions before any serious impact of the merger was felt, its logical course would have been to rescind the traffic conditions in issuing its Report on Reconsideration, just as it rescinded the indemnification condition. The fact that it left the existing traffic conditions of Appendix G in force establishes that the Commission believed on reconsideration, just as it believed on issuing its original Order of April 6, that immediate protection should be afforded the protected carriers.

Moreover, the merged Penn-Central can initiate steps in the first year as a result of which E-L would feel the full impact of the merger in the second year (unless included in the N&W System by that time or protected by adequate protective provisions), and the crushing effects of the Penn-Central merger on E-L can continue thereafter for a long time—resulting in an inevitable deterioration of the transportation service provided by E-L and perhaps making it unable to survive at all. There is nothing in the testimony to which the Commission and the Court referred that contains any indication to the contrary.

Finally, the majority below estimated that an order relating to modified traffic conditions could be entered by the Commission by the spring of 1967 (p. A-32) but that, when requests for reconsideration of modified conditions and the prospect of renewed court proceedings were considered, "any realistic estimate of delay of consummation from an

injunction pending reconsideration would take us to the end of 1967." (p. A-33). Thus the majority thought that more than a year might well elapse before modified traffic conditions became effective.

(2)

As to the period after any modification of the traffic conditions, there is uncertainty as to when that period will start and when it will end, and as to what protection E-L will have.

Judge Weinfeld summarized all of the uncertainties in a single sentence (page 39 above).

Supplementary comment.

It is submitted that a showing of irreparable injury need not be a demonstration that a catastrophic injury is a certainty. It should be enough that, as here, the consequences of a consummation of a merger are virtually certain to include significant injury; that there is a real risk that the merger will eventually result in injuries of most formidable dimensions; that any of the injuries flowing from the merger will be irreparable; and that the merger is an irreversible event.

POINT VI.

The estimate of the expected savings from the merger, and the prospects of improvements in service therefrom, was the only reason given by the Commission for prompt consummation of the merger which can withstand analysis.

Since the Commission did not decide that the prospect of the savings and improved service, taken alone, made immediate consummation of the merger consistent with the public interest, the three-Judge Court should have granted the motion for an interlocutory injunction.

The Commission's statement of its reasons for approving a prompt consummation of the merger, given at pages 11-13 of the Report of September 16 (p. B-13 to B-16), referred to its finding that "the merger will eventually pro-

duce annual savings of at least $80 million dollars for the applicants" and also spoke of the improved service which could be expected because of the savings.

It may be noted that the $80 million dollars would be *before income taxes* and that the aggregate consolidated net income of Penn and Central *after income taxes* increased by more than $117 million dollars a year between the year 1961 and the year 1965 without any merger (see above, p. 29). However, that is not of decisive importance.

The decisive thing, it is respectfully submitted, is that, as we have shown in Points II and III, the Commission gave several reasons for its conclusion "that the public interest requires prompt consummation of the proposed merger" and that most of them are demonstrably untenable—one of them, relating to the New Haven having been found by all of the Judges of the three-Judge Court to be untenable.

The expectation of savings from the merger was also urged upon the three-Judge Court as a ground for denying the interlocutory injunction because it would involve injury to the Penn and the Central. That argument makes it fitting to weigh a deferment of the savings against the adverse consequences of a denial of the interlocutory injunction and the immediate consummation of the merger.

In the main most of those adverse consequences have already been commented upon. In Point VII we emphasize that the failure to grant an interlocutory injunction will deprive the petitioner of an effective judicial review of the Commission's Orders, if the merger be consummated and the petitioner and other plaintiffs be left to whatever relief they can obtain thereafter.

If prospective savings (and expected improvements of service to be financed thereby) could *alone* be of decisive

importance on an application for an interlocutory injunction involving the merger of two substantial railroads, there could never be an effective judicial review of such a merger.

POINT VII.

The Order of the three-Judge Court did not accord to the appellant an effective judicial review of the Commission's Orders.

An effective judicial review can only be obtained by a reversal of the District Court's Order.

In considering what the three-Judge Court did and what this Court can do, two things stand out.

If the merger be consummated, it cannot be unscrambled. There was no disagreement about this among the members of the Court.[15]

E-L will then be dependent on (1) such Order or Orders as the Commission may enter after the further hearing provided for by the Report of September 16 and now scheduled by the Commission's Order of September 29 to commence on October 31, and (2) such relief as E-L may be able to obtain if it should seek a judicial review of the Commission's further Order or Orders.

The decision of the three-Judge Court.

The majority opinion of the three-Judge Court implies very strongly that it is intended to be virtually equivalent to a decision on the merits in favor of the defendants. There are various statements which support an inference to that

---

[15] See page A-35, third sentence, and page A-60, the first sentence which starts on that page.

effect, of which perhaps the most explicit are to be found at pages A-18 and A-19.[16]

In any event, the practical effect of a consummation of the merger would be to set in train the actions which so gravely threaten E-L, without any present restriction except as provided by the present traffic conditions and the prospect that there may be a retroactive indemnification condition.

As a preface to a listing of the "four factors to be considered in determining whether to stay the order of an administrative agency pending full review", the majority opinion says (p. A-16):

> "It is just as important that a court should not subject a valid railroad merger to unnecessary delay as that it should permanently enjoin one that does not conform to statutory standards or temporarily enjoin one as to whose validity there are truly serious doubts which it needs time to resolve."

The implication is unmistakable that to the majority the Commission's Orders presented no "truly serious doubts which [the Court] needs time to resolve". With due deference, this implication can only be characterized as astonishing.

We do not argue that the division of a three-Judge Court, two to one, as to the validity of an Order of the Commission automatically establishes that there are "truly serious doubts" as to the validity of the Order.

We do contend, without the slightest reservation, that such an opinion as Judge Weinfeld's, in and of itself, *at least* established the existence of "truly serious doubts" about the

[16] Starting in the ninth line on page A-18 and ending in the fifth line on page A-19.

validity of the Commission's Order of April 6 as modified by that of September 16.

Further, we contend that the record before the Court, which we hope has been discussed adequately, establishes that there should have been *at least* "truly serious doubts" as to the validity of the Commission's Orders even if Judge Weinfeld had not been a member of the Court and the Court's decision had been unanimous.

On the page preceding that containing the last quotation which we have just given the Court said (p. A-15):

> "We see no basis for the notion, apparently entertained by certain plaintiffs, that all railroad mergers should be temporarily enjoined on the mere request of other carriers;***."

We do not know what plaintiffs entertained the notion to which the majority referred. It is true that we cited to the Court a number of instances, involving transactions governed by Section 5(2) of the Interstate Commerce Act, in which the consummation of a merger had been stayed or enjoined pending a judicial decision on the merits:

Illinois Central Railroad Company, et al. v. *United States* (N.D. Ill., E.D. 1965—unreported[17])
Florida East Coast Railway Company v. *United States,* 228 F.Supp. 340 (M.D. Fla. 1964)
Minneapolis & St. Louis Ry. Co. v. *United States,* 165 F.Supp. 893, 901 (D. Minn. 1958)
Canadian Pacific Ry. Co. v. *United States,* 158 F.Supp. 248, 251 (D. Minn. 1958)
City of Nashville, Tennessee v. *United States,* 155 F.Supp. 98, 100 (M.D. Tenn. 1957)

---

[17] On August 25, 1965 a temporary restraining order was entered by District Judge Decker and on November 29, 1965 the three-Judge Court granted an interlocutory injunction against acquisition by Missouri Pacific Railroad Company of control of Chicago & Eastern Illinois Railroad Company.

We noted that there appeared to be only one case in which such relief was denied, and that that case was so clearly distinguishable as not to be significant.[18]

E-L's contention was and is that there should be a full judicial review of a Commission authorization of a Section 5(2) transaction whenever a substantial question is raised as to the validity of the Commission's actions.

The majority said that if an injunction were granted "until final hearing of these actions, the question that would be faced at that time would be whether to grant one pending the Commission's decision on reconsideration, and we would know little more than we do now, unless we were to conduct a trial at which evidence would be taken on the claims with respect to the protective conditions now made in affidavits" (p. A-18). Laying to one side the facts that evidence might have been introduced at a final hearing

[18] In *Stott* v. *United States*, 154 F. Supp. 389 (S.D.N.Y. 1957), which involved the authorization by the Interstate Commerce Commission of the merger of Louisville & Nashville Railroad Company with the Nashville, Chattanooga & St. Louis Railway, District Judge Bryan denied a motion for a temporary restraining order. Stott was a minority stockholder of the Nashville, Chattanooga & St. Louis Railway. Judge Bryan's denial of the motion was made on two grounds, either of which would have sufficed and neither of which finds any counterpart here.

The first ground was that an earlier action challenging the same order of the Commission had been brought in the United States District Court for the Middle District of Tennessee and the Commission's order had been upheld; Stott chose not to intervene in Tennessee, as he could have done, but later brought a separate action in the Southern District of New York (see particularly 154 F. Supp. at 392 and 393).

Perhaps even more clearly decisive was the fact that Stott and his associates could not be hurt by the denial of a temporary restraining order, since their only complaint was that they were entitled to more Louisville & Nashville stock and, as Judge Bryan found, (1) the Commission had power to modify its merger order accordingly if the plaintiffs prevailed and (2) the merging railroads had agreed to a procedure, involving the issuance of due bills, which would assure the receipt by the Nashville, Chattanooga & St. Louis Railway stockholders of any additional stock to which they might be held to be entitled (154 F. Supp. at 393).

and that the evidence might have related to matters on which the Commission would not take evidence (such as the absence of protection under the present Appendix G conditions prior to any modification thereof), it is notable that the majority seemed to be of the opinion that they had learned as much as they might expect to have learned if there were a final hearing in due course.

In this connection, the following timetable is not without significance:

September 8 — first action started

September 19 — Commission's Report of September 16 released

September 21 — argument before the Court

September 27 — briefs due

September 30 — Commission's Order of September 29 released

October 4 — the decision

One of the most extraordinary features of the succession of developments since the Commission's Report of April 6 was issued is that *there has never been any analysis by the Commission or by the Court of the specific and substantial objections made to the protective conditions in E-L's petition for reconsideration* filed with the Commission on July 8, a copy of which is attached as Exhibit E to the complaint filed in Court on September 8.

The Commission said that the three protected carriers had "raised valid issues as to interpretation, application, scope and other aspects of the protection" (p. 37; p. B-41), but did not say what they were.

The Court's comments on the protective conditions have already been referred to (see above, p. 40-45).

Quite aside from the majority opinion's many errors and omissions already noted, was it necessary for the Court to reach what it evidently intended to be a final decision on the merits—and what will, as a practical matter, be such a final decision if allowed to stand—so quickly and without an adequate exploration of the objections to the protective conditions?

When Judge Friendly asked General Counsel for the Commission whether a six-months postponement would imperil the inclusion of the New Haven, when six and one-half years hadn't imperiled it thus far, the Commission's General Counsel answered (Tr. 113):

"We aren't concerned about three or four months."

Finally, it will be observed that the Court's decision rests on at least these premises:

1. A post-merger hearing relating to the protective conditions is legally and practically the equivalent of a pre-merger hearing. The Court said: "The claim of lack of hearing with respect to the protective conditions is shattered by the Commission's report on reconsideration" (p. A-22).

2. The Commission can be counted on to fashion new conditions which will not "be so weak as to imperil the three carriers or so strong as appreciably to injure the others" (p. A-33, footnote 13). While what we have quoted related to a limited period, the opinion, taken as a whole, presupposes that the Commission will be able to solve satisfactorily all problems presented by the protective conditions.

3. If the Commission should fail in any significant respect, the reviewing Court, somehow or other, will be able to indicate to the Commission what ought to be done and, in one way or another, appellant and others similarly affected will end up with satisfactory protective measures.

The inadequacy of any judicial review of an order or orders entered after a post-merger rehearing.

In the discussion of a post-merger judicial review at pages A-58 to A-60, Judge Weinfeld said, at page A-59:

> "A post-merger judicial review of such final terms and conditions as the Commission may hereafter determine will afford no real remedy if in fact the Commission's action is found contrary to law. The Court, upon such a review, does not itself have the power to prescribe adequate protective terms."

All parties and members of the Court are in agreement that a reviewing Court would not have the power to direct the Commission what to do, and that view is fully supported by the cases cited in footnote 44 at page A-60 of the dissenting opinion.

The majority's answer is to be found at pages A-36 and A-37 of their opinion. It is aptly characterized in the dissenting opinion as involving "a gentle nudging of the Commission" (p. A-60).

To doubt as to the efficacy of "a gentle nudging" must be added concern whether, in view of what is said in the majority opinion, the majority of the present Court might not consider any modified protective conditions virtually immune from attack in the Court "because of the technical nature of the subject-matter" (p. A-36).

A reversal by this Court of the decision of the Three-Judge Court.

It is, of course, obvious that a reversal by this Court of the decision of the three-Judge Court can accomplish, or at least lead to, an effective judicial review of the Commission's Orders.

It would appear premature to suggest at this juncture what an order of reversal might provide.

POINT VIII

The Commission's Orders were made in violation of statutory requirements for notice and hearing and have deprived appellant of procedural due process.

It is undisputed that, when the Commission adopted the novel, complex and important protective conditions specified in Appendix G to its Report of April 6, it did so without affording any party to the proceeding notice that it was considering the imposition of such conditions and without affording any party an opportunity for the presentation of evidence and argument at a hearing directed to the framing of such conditions. As Judge Weinfeld pointed out (p. A-57) the Commission's General Counsel admitted as much on oral argument.

It is appellant's position that such conduct on the part of the Commission violated Section 5(2) of the Interstate Commerce Act, Sections 5(a), 5(b), 7(a) and 7(c) of the Administrative Procedure Act and that the parties affected were deprived the procedural due process of law to which they are entitled under the Fifth Amendment to the United States Constitution. Appellant's position is supported by the following:

Morgan v. *United States*, 304 U.S. 1 at 18-19 (1938)

Hill v. *Federal Power Commission*, 335 F. 2d 355 at 363 (5th Cir. 1964)

Chicago, Burlington & Quincy R. Co. v. *United States*, 242 F. Supp. 414 at 417 (N.D. Ill. 1965), aff'd 382 U.S. 422 (1966)

The majority's holding on this issue was that plaintiff's claim had been "shattered by the Commission's report on reconsideration" (p. A-22). Judge Weinfeld sharply disagreed (p. A-57, 58).

We submit that the Commission's Report on Reconsideration has done nothing to cure the fatal defects in the Commission's original Order. The Commission's Order of September 16 has left in force the traffic conditions, as originally promulgated without notice or adequate opportunity to be heard, and these are the only protective conditions on which the Commission has now affirmatively conditioned consummation of the merger.

The fact that the Commission has ordered post-merger hearings on all protective hearings cannot satisfy the statutory and constitutional requirements. The uncertainties surrounding the outcome of these post-merger hearings are manifold and infinite and it is impossible to predict whether, when all parties are given an opportunity to present evidence and to be heard, the Commission will be able to frame conditions adequate to afford the protection which the Commission has found that the protected carriers require.

As this Court said in *Morgan* v. *United States,* 304 U.S. 1, 18-19 (1938):

> "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and *to be heard* upon its proposals *before* it issues its final command."

Here the Commission has issued its "final command" for consummation of the merger, as conditioned by the Commission, without affording those who will be grievously affected by that consummation and condition the opportunity to be heard *before* the effects of consummation are to be visited upon them.

SCOPE OF APPELLANT'S APPEAL AND THE RELIEF REQUESTED

It should be made clear that E-L does *not* ask that steps be enjoined which are contemplated by the Commission's Order of April 6, as modified by the Order of September 16, and which neither constitute nor require a consummation of the merger.

E-L does not ask that the further hearing scheduled for October 31 be stayed.

Nor does it ask that the two Railroad Companies be prevented from going forward with the steps contemplated by Section 8 of Appendix A to the April 6 report, looking toward the ultimate inclusion of the New Haven in a Penn-Central System.

Nor does it seek to prevent or delay other progress toward the ultimate consummation of the proposed merger, provided that the merger is not consummated and that nothing is done which would require its consummation.

In this connection, it may be noted that E-L's application to Mr. Justice Harlan for a stay was for an order restraining the consummation of the merger.

CONCLUSION

Probable jurisdiction of appellant's appeal should be noted and the case set down for full hearing on the merits.

October 17, 1966.

Respectfully submitted,

EDWARD W. BOURNE
Attorney for Appellant,
Erie-Lackawanna Railroad Company
120 Broadway
New York, N. Y. 10005

J. KENNETH CAMPBELL
JOHN T. RAFFERTY
Of Counsel

APPENDIX A

Provisions of Judicial Code (Title 28 U.S.C.) Relating to Judicial Review of Commission Order.

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§ 1336. Interstate Commerce Commission's orders

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final. As amended Aug. 30, 1964, Pub.L. 88-513, § 1, 78 Stat. 695.

§ 1398. Interstate Commerce Commission's orders

(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

(b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue. As amended Aug. 30, 1964, Pub.L. 88-513, § 2, 78 Stat. 695.

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to

whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. As amended June 11, 1960, Pub.L. 86-507, § 1(19), 74 Stat. 201.

§ 2321. Procedure generally; process

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in

part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States. As amended May 24, 1949, c. 139, § 115, 63 Stat. 105.

§ 2322. United States as party

All actions specified in section 2321 of this title shall be brought by or against the United States.

§ 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or

nonaction of the Attorney General therein. As amended May 24, 1949, c. 139, § 116, 63 Stat. 105.

§ 2324. Stay of Commission's order

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

§ 2325. Injunction; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

APPENDIX B

Pertinent Provisions of Section 5 of the Interstate Commerce Act (Title 49 U.S.C. § 5).

§ 5. Combinations and consolidations of carriers

Pooling; division of traffic, service, or earnings

(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinon, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further,* That any contract, agreement, or combination to which any common carrier by water subject to chapter 12 of this title is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by

order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

Unifications, mergers, and acquisitions of control

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle

are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving

a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

* * * * *

Supplemental orders by Commission

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

APPENDIX C

Pertinent Provisions of the Administrative Procedure Act.

§ 5(a), 5 U.S.C. § 1004(a)

Notice of hearing and issues.

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

§ 5(b), 5 U.S.C. § 1004(b)

Procedure

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

§ 7(c), 5 U.S.C. § 1006(c)

Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

• • • •

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

§ 8(b), 5 U.S.C. § 1007(b)

Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

• • • •

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the

record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

§ 10, 5 U.S.C. § 1009

Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency

action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are

subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.